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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 535

HARRIS HENRY HORNER Pro se,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

HARRIS HENRY HORNER, *pro se.*
440 West 63rd Street,
Chicago, Illinois.

The Scheffer Press, Inc.—FInancial 6-2694

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HARRIS HENRY HORNER, Pro se,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

No. .....

PETITION FOR WRIT OF CERTIORARI.

Your Petitioner, HARRIS HENRY HORNER, represents as follows:

CLAIM ONE

Claim for illusionary or "dummy" weapons of warfare by owner and inventor of unpatented inventions and devices.

I.

That on, to-wit, May 3rd, 1917, claimant submitted to the respondent models, prints, descriptive details and experiments of his invention in accordance with directions contained in War Department Board of Ordnance and Fortifications "Memorandum for Inventors" form 8, asking for remuneration, if considered, and that on, to-wit, May 10th, 1917, the respondent, through the War Department Chief of Ordnance, acknowledged receipt of the aforesaid, and among other things stated that the aforesaid received consideration and would be filed for later consideration, government file No. 400. 111/6617.

II.

That on, to-wit, June 4th, 1941, the claimant herein resubmitted the aforesaid inventions to the respondent, who on June 6th, 1941, acknowledged the said resubmission through its Office of Inventions, and also by the Navy Department on the same date, viz. June 6th, 1941, file ENI-9 JEM/FP and also file 23840.

III.

That the claimant is informed, and believes, and states the fact to be, that the said unpatented inventions or devices were ultimately manufactured for, and used by the United States of America, the Army and Navy thereof, or other departments, and still continues to do so without remuneration to the claimant, as originator and inventor of the said unpatented inventions or devices, in violation of Sections 42, 68, and 89 to 96, both inclusive, and such other sections of Title 35 of the United States Code, as may apply.

IV.

That on, to-wit, March 22nd, 1947, the claimant herein made a demand on this claim, in writing, to the United States of America, the respondent herein, by serving the same on the War Department of the United States of America and the President of the United States of America.

V.

That on, to-wit, August 27th, 1947, the respondent denied the claim set forth herein by the Office of the Judge Advocate General, United States Army Patents Division, and that the claim has not since been paid or settled, and again denied at other times and occasions by the respondent.

VI.

That at the time of submission to the respondent of said claim for consideration, the remuneration to the claimant was to be fixed by the War Department Board of Ordnance and Fortification, in accordance with Form 8, which was never done, although often requested to do so.

VII.

That by the unauthorized use by the respondent, as aforesaid, through the manufacture, by contractors and sub-contractors of the respondent, the claimant has been damaged in large sum, to-wit, *One Billion Dollars ($1,000,000,000.00)* and hereby prays *for accounting* showing the sums of money paid the said contractors and sub-*contractors,* which information is not accessible to the claimant, but is wholly within the possession of the respondent.

CLAIM TWO

Claim for unpatented devices (air tug) to increase speed, maneuverability and altering direction of naval craft by the full utilization of the thrust of aero engines and propellers.

VIII.

That on, to-wit, August 17th, 1942, for consideration, claimant submitted to the respondent, through its Department of Commerce, The National Inventors Council, certain photographs, blue prints and written description of his design of naval craft, which was designed to comprehend a mounting, positioning and retrieving device for an airplane, and sometimes known as "Air Tug," which was not patented, all of which was acknowledged by the respondent on May 28th, 1946, by the Chief Engineer of

The National Inventors Council, and which acknowledgment stated, among other things, that the same was, to-wit, not a useable device.

IX.

That the claimant is informed, and believes, and states the fact to be, that the said unpatented inventions or devices were ultimately manufactured for, and used by the United States of America, the Army and Navy thereof, or other departments, and still continues to do so without remuneration to the claimant, as originator and inventor of the said unpatented inventions or devices, in violation of Sections 42, 68, and 89 to 96, both inclusive, and such other sections of Title 35 of the United States Code, as may apply.

X.

That on, to-wit, March 22nd, 1947, the claimant herein made a demand on this claim, in writing, to the United States of America, the respondent herein, by serving the same on the War Department of the United States of America and the President of the United States of America.

XI.

That on, to-wit, August 27th, 1947, the respondent denied the claim set forth herein by the Office of the Judge Advocate General, United States Army Patents Division, and that the claim has not since been paid or settled, and again denied at other times and occasions by the respondent.

XII.

That Claim Number Two was submitted in accord with Bulletin Number One "A Memorandum for Inventors," issued by the Department of Commerce, The National Inventors Council, on August 17th, 1942.

XIII.

That by the unauthorized use by the respondent, as aforesaid, through the manufacture, by contractors and sub-contractors of the respondent, the claimant has been damaged in large sum, to-wit, *Five Million Dollars ($5,000,000.00)* and hereby prays for accounting showing the sums of money paid the said contractors and sub-contractors, which information is not accessible to the claimant, but is wholly with the possession of the respondent.

As to Facts Set Up in Claim 1 of Said Petition.

1. May I call the attention of the court to paragraph 1 of Claim 1 (page 1) which sets up, among other things, that models, prints, descriptive details and experiments of plaintiff's inventions were submitted to the defendant, asking for remuneration, which the defendant acknowledged receipt of the same and that it had received consideration and would be filed for *later consideration.*

2. Also, may I call the court's attention to paragraph 6 (page 3) of said petition which states that, in accordance with defendant's Form 8, the plaintiff's submission *asks remuneration* to be fixed by the War Department Board of Ordnance and Fortification, in accordance with Government Form 8, which the defendant failed to do, although often requested by the plaintiff.

3. Also, may I call the court's attention to paragraph 3 (page 2) of said Petition, which, among other things, alleges the defendant used the unpatented inventions, subsequent to plaintiff's submissions thereof to the defendant.

4. Therefore, these three allegations, even standing alone, constitute a contract between the plaintiff and the defendant.

As to Facts Set Up in Claim 2 of Said Petition.

1. Now may I call the court's attention to Claim 2 of the said Petition (page 3) to-wit: that photographs, blue prints and written descriptions of plaintiff's design were submitted to the defendant, which was acknowledged by the defendant and by the defendant stated not to be a useable device, but the defendant did not return the same to the plaintiff, although often requested to do so, and within a short period of time commenced to use the same as set forth in paragraph 3 (page 4) of said Petition.

Without the whole of the Title 35, plaintiff would not have a cause of action, and it is the duty of this court to construe these statutes in such a manner as to the court may seem just what our Congress meant. Certainly, they did not want the United States Government to take these devices, not return them upon request, but keep, use and manufacture them for their own use.

As this court is well aware that Article I, Section 8 of the Constitution provides:

> "The Congress shall have power * * * to promote the progress of science and useful arts, by securing for limited times to authors and *inventors the exclusive right to their respective writings and discoveries.*"

Respectfully submitted,

HARRIS HENRY HORNER,

pro se,

MOTION TO DISMISS.

(Filed March 16, 1949)

Now comes the defendant, by its Assistant Attorney General, and moves to dismiss the petition filed herein on February 21, 1949, for the reason that said petition does not set forth any cause of action against defendant of which this Court has jurisdiction, and upon the ground that said petition fails to set forth facts sufficient to constitute a cause of action and for the further reason that said petition otherwise fails to comply with Rules 10, 11 and 12 of the rules of this Court, all as is more particularly set forth in the annexed brief in support hereof.

Respectfully submitted,

H. G. MORISON,
Assistant Attorney General.

BERNARD WOHLFERT,
Attorney.

JURISDICTION.

The Rules Of The Court numbers (40-41) give The Court Jurisdiction To Review Opinions, and Orders Of The Court Of Claims.

OPINIONS OF THE COURT OF CLAIMS page

UNITED STATES COURT OF CLAIMS.

Harris Henry Horner
vs.
The United States } No. 49030

Clerks Office
Washington D. C.

Nov. 7, 1949.

To The Attorney Of Record and The Assistant Attorney General and Commissioners.

Sirs.

Please take notice that in the above entitled cause there has been entered this day on Plaintiffs Motion for new trial the following order.

It is ordered this seventh (7) day of November 1949, that the said Motion be and the same is overruled.

Respectfully,

Willard L. Hart,
Clerk Of The Court Of Claims.

IN THE UNITED STATES COURT OF CLAIMS.

No. 49030

(Decided October 3, 1949)

HARRIS HENRY HORNER v. THE UNITED STATES.

Mr. Harris Henry Horner, pro se.

Mr. Bernard Wohlfert, with whom was *Mr. Assistant Attorney General H. G. Morison,* for the defendant.

ON DEFENDANT'S MOTION TO DISMISS.

PER CURIAM: Plaintiff filed his petition herein to recover compensation under the Act of June 25, 1910, as amended, and the "Royalty Adjustment Act" of October 31, 1942 (35 U. S. C. §§ 42, 68, and 89 to 96, inclusive), for the alleged unauthorized use by defendant of two unpatented inventions or devices.

The first claim asserted in the petition relates to the alleged use by defendant of plaintiff's unpatented inventions or devices for "illusionary or 'dummy' weapons of warfare."

From the allegations of the petition and the exhibits submitted therewith it appears, with respect to the first claim, that by letter of May 3, 1917, plaintiff submitted models, prints, descriptive details and experiments of his unpatented inventions, in accordance with directions contained in Form 8, entitled "Memorandum for Inventors," issued by the War Department Board of Ordnance and Fortification, and asked that he be paid compensation therefor. On May 10, 1917, the Chief of Ordnance, War Department, wrote plaintiff acknowledging receipt of his submission and advising him that the subject matter of his submission would have no immediate utility for the Department. No further action was taken by defendant on this submission by plaintiff.

Thereafter, in June 1941, the plaintiff, by correspondence with the Navy Department and the National Inventors Council, resubmitted his unpatented inventions for consideration and asked that he be paid compensation therefor. No facts are alleged to show that any arrangement or agreement was made with plaintiff by anyone having au-

thority to act for the United States for the use by the Government of his alleged inventions and/or for the payment of compensation therefor.

The petition alleges that the defendant used plaintiff's unpatented inventions and continues to use them without his authority and without payment of compensation therefor in violation of Sections 42, 68, and 89 to 96, inclusive, Title 35 of the United States Code, and that plaintiff's claim for payment of compensation for such use has been denied.

The second claim asserted in the petition is for the alleged use by defendant without payment of compensation of plaintiff's "unpatented devices (air tug) to increase speed, maneuverability and altering direction of naval craft by the full utilization of the thrust of aero engines and propellers."

Plaintiff alleges that on August 17, 1942, he submitted to the defendant for consideration, through the National Inventors Council, Department of Commerce, certain photographs, blueprints, and written descriptions of his design of naval craft. These documents and the information therein contained were acknowledged by the National Inventors Council in which acknowledgment the plaintiff was advised, among other things, that his alleged invention was not a usable device.

Plaintiff alleges that his unpatented device involved in the second claim was used and continues to be used by defendant without his authorization and in violation of Sections 42, 68, and 89 to 96, inclusive, Title 35 of the U. S. Code, and that on August 27, 1947, his claim for compensation for such use was denied by the Office of the Judge Advocate General, U. S. Army Patents Division.

The foregoing statement of the substance of the allegations of the petition shows that plaintiff has not stated a cause of action within the jurisdiction of the court. Sections 42 and 68 of Title 35 of the U. S. Code (1946 Ed.),[1] upon which plaintiff relies, authorize suit against the United States for compensation for unauthorized use or infringement by the Government of patented inventions. The alleged inventions, for the alleged use of which plaintiff seeks compensation, were not patented. It is clear, there-

[1] Reenacted as Sec. 1498, Title 28, U. S. C. Revised.

fore, that the plaintiff cannot maintain the suit under these sections. *Robbins* v. *United States,* 106 C. Cls. 278, 279; *Patton* v. *United States,* 110 C. Cls. 195, 202.

The claims are also predicated upon the Act of October 31, 1942 (56 Stat. 1013), known as the "Royalty Adjustment Act," the provisions of which are embodied in the U. S. Code (1946 Ed.) as Sections 89 to 96, inclusive, of Title 35. Considered as a whole the Royalty Adjustment Act does not authorize suit upon facts such as are alleged by plaintiff. The jurisdiction of the court under the Act is expressly conditioned upon the issuance by the head of the department or agency concerned of an order reducing royalties being paid to a licensor under a license for the use or manufacture of his inventions, whether patented or unpatented. Plaintiff had no license agreement for the payment of royalties on his unpatented inventions and no administrative order fixing the amount of royalty to be paid for the use of such invention was made. The facts alleged by plaintiff do not, therefore, bring either of his claims within any of the provisions of the Act of October 31, 1942, *supra. Patton* v. *United State, supra; Yassin* v. *United States,* 110 C. Cls. 211; *Fulmer* v. *United States,* 111 C. Cls. 591, 593.

The facts alleged are not sufficient to show the existence of a contract, express or implied in fact, between the Government and plaintiff for the payment of compensation for the information and data submitted by him or for the use of his alleged inventions. *Wright* v. *United States,* 86 C. Cls. 290, 299. No one having authority to bind the United States by contract, promised to pay plaintiff compensation for the information submitted or for the use of the unpatented devices described therein. The correspondence filed as a part of the petition shows that plaintiff's claims for compensation were denied. See *Gaylor* v. *Wilder,* 10 How. 477. In *Patton* v. *United States, supra,* this court said:

> • • • The fact that plaintiff endeavored to establish a contract relationship with the Government is not enough to give this court jurisdiction to hear and determine his claim.

It is the opinion of the court that the petition does not set forth a cause of action of which the court has jurisdiction. The defendant's motion to dismiss is, therefore, sustained and the petition is dismissed. It is so ordered.

PROPOSITIONS OF LAW RELIED ON AND CITATION OF CASES.

Article I, Sec. 8, of the Constitution of America.
U.S.C. Title *#35. And all sec. that apply.
U.S.C. Sec. 3-14. Title 35.
Act of Oct. 15, 1914. 38 Stat. 731. Clayton Act, Sec. 3 *14* U.S.C. title 35.
Sec. 4921. R S U.S.C. Title 35. Sec. 70.
Sec. 4894. R. S. U.S. Title 35, Sec. 37.
Act Oct. 1942. Title 35. Sec. 89.90.91.94.95.96. 42.c.42.a.42.b.42.
Act of Aug. 8, 1946. Public Law 690. Sec. 2. a. b. Sec. 4.
Act Aug. 1.46. Public law 585. Sec. II.a.2.3.
Sec. 4929.r.s.u.s.c. title 33, Sec. 73.

STATEMENT OF THE CASE.

The Petition For The Writ Briefly States The Case.

THE ERRORS ASSIGNED.

The Court erred in finding that it failed to have jurisdiction and dismissing the petitioner's Petition.

The transcript is not complete.

The transcript does not set up the amendment ordered by the Court of May 2nd, 1949.

Which are exhibits of the plaintiff (—1—) to (—17—) both inclusive, and ready to be produced on order of this Court.

LIST OF AUTHORITIES.

Page 2, Paragraph 3 of the Transcript.
Page 4, Paragraph 9 of the Transcript.
Page 10, Page (10), "Argument and Citations" of Transcript.
Page 12 of the Transcript, Article (I), Sec. 8 of the Constitution of the U. S.
Page 10, 11. Argument and Citations of the Transcript.

ARGUMENT AND CONSTITUTIONAL PROVISIONS.

Page 10, 11. Argument and Citations of the Transcript.

Page 9. Facts set up in Claim I, said petition.

Page 10. Argument and Citation in Page 10 of the transcript.

Page 9. As to facts set up in Claim I of said petition.

The Clayton Act of October 15, 1914, 38. Stat. 731. Sec. 3. U.S.C., Sec. 3, U.S.C. title 15. Sec. 14, provides among other things that the Defendant violated this section and should not take the Fruits of the Plaintiffs Labor without remuneration, sustained by Exhibit 8, which exhibits the Clerk of the U.S. Court of Claims failed to make a part of the transcript.

Defendants Violation of Article I, Sec. 8, of the Constitution of the U. S.

As to Facts Set up in Claim 1 of Said Petition.

1. May I call the attention of the court to paragraph 1 of Claim 1 (page 1) which sets up, among other things, that models, prints, descriptive details and experiments of plaintiff's inventions were submitted to the defendant, asking for remuneration, which the defendant acknowledged receipt of the same and that it had received consideration and would be filed for later consideration.

2. Also, may I call the court's attention to paragraph 6 (page 3) of said petition which states that, in accordance with defendant's Form 8, the plaintiff's submission asks remuneration to be fixed by the War Department Board

of Ordnance and Fortification, in accordance with Government Form 8, which the defendant failed to do, although often requested by the plaintiff.

Argument and Citations.

The Counsel for the defendant bases practically the whole of his argument for dismissal on the ground that the devices of the plaintiff were never patented, citing parts of the statute and cases, which this plaintiff submits are not in point with the case in question and he either purposely or through oversight failed to go into thoroughly the Sections 89-96, inclusive, of Title 35, sometimes referred to as the "Royalty Adjustment Act." May I, therefore, without quoting, call the court's attention to Sections 89, 90, 91, 92, 93, and 94 and 95 of Title USC, and especially point out that said Section 94 provides that it is not necessary that the invention be patented, and, when manufactured for the government, etc., shall be construed as use or manufacture for the United States.

I, therefore, submit that the Motion to Dismiss, directing the court's attention to the fact that the devices, etc. are not patented, is without any effect, especially when and if the court considers the whole of Title 35, and especially wherein it is set forth in Section 94 of Title 35 "whether patented or unpatented."

May I further submit to the court that both these devices were submitted with request for remuneration, that the defendant acknowledged, retained, used, sold and manufactured the said same devices without the consent of the plaintiff, who had repeatedly requested and demanded that the said same devices be returned to him. By these acts of the defendant, either through *mistake* or *intentional fraud*, the plaintiff has been unable to realize the fruits of his labor, and he hereby calls the attention to the court

that it cannot be construed that Congress intended by its enactment of the whole of Title 35 to foreclose the plaintiff from recovery for his claims. His efforts to have the defendant return them failed and he could not, therefore, have had them patented. Certainly, Congress had no intention of permitting the defendant to take and use the plaintiff's inventions without compensating the plaintiff therefor, and I respectfully submit that it is the duty of the court to deny defendant's Motion to Dismiss the Petition, in this case, believing the court would be justified in so construing Title 35 and its applicable paragraphs.

The plaintiff submits that he has complied with Rules 10, 11 and 12, and that counsel has failed to specifically set forth wherein he has failed to do so.

The case of *Ross Cummins Patton* v. *U. S.* 110 U Cls 195, and the *Fulmer case, Fulmer* v. *U.S.* 111 c Cls 591, appear to be the latest cases on the matter of Motion to Dismiss or the so-called Demurrer. The facts in both cases do not fit the facts in this case and are far from being "on all fours" with the case in question.

Without the whole of the Title 35, plaintiff would not have a cause of action, and it is the duty of this court to construe these statutes in such a manner as to the court may seem just what our Congress meant. Certainly, they did not want the United States Government to take these devices, not return them upon request, but keep, use and manufacture them for their own use.

As this court is well aware that Article I, Section 8 of the Constitution provides:

> "The Congress shall have power * * * to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

and the court should take into consideration that our Congress intended to do just that when they enacted the laws under Title 35.

If this court will read the petition filed herein in its entirety (it is only four short pages) and consider the intention of our Congress, I submit that it gives the court jurisdiction to hear and consider the evidence, and if the court does not so find the plaintiff should be entitled to file an Amendment to his Petition and a reasonable time to do so.

CONCLUSION.

The Court of Claims had jurisdiction as follows:

Claim One.

An Agreement In Writing, To Reimburse Petitioner (Claimant).

"If used." Set out in page one of the original petition. Paragraph One. And paragraph one on page one of the transcript.

Claim Two.

An implied contract by taking and using "air tug" without remuneration to claimant during war period without protection to plaintiff? This was done during the war period when the plaintiff could not avail himself to the patent protection. It was the duty of the defendant to avail itself to patent protection to protect the plaintiff? Considering that both Claim One and Two was filed for later consideration and filed for future consideration.

That when matters of this nature are filed for future consideration, it becomes the duty of the defendant to obtain patents and suppress them during war periods? Not

use them falsely then release them to the public? With no protection to the plaintiff? And considering the concrete fact war has not been declared by our Congress to be over.

Respectfully submitted,

HARRIS HENRY HORNER,
pro se,
440 W. 63rd St.,
Chicago, Illinois.